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SIXTH DIVISION  
December 30, 2011

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 MC 1258779
	)	
HAMZA SARROUKH,	)	The Honorable
	)	Stuart P. Katz,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justice Garcia concurred in the judgment.  
Presiding Justice Robert E. Gordon specially concurred.

**ORDER**

¶ 1 HELD: The trial court properly considered defendant's section 2-1401 petition alleging ineffective assistance of counsel and properly dismissed the petition where defendant failed to diligently raise his claim or file the petition.

¶ 2 Defendant, Hamza Sarroukh, appeals the trial court's order denying his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). Defendant contends the trial court erred in denying his section 2-1401

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petition where he sufficiently alleged a cause of action for ineffective assistance of counsel.

Based on the following, we affirm.

¶ 3

#### FACTS

¶ 4 On December 17, 2008, defendant pled guilty to misdemeanor theft and was sentenced to one year of supervision in addition to being ordered to pay restitution and complete community service. Defendant was admonished that he had 30 days to file a motion to withdraw the guilty plea and, if denied, 30 days to file a notice of appeal. Defendant did not file a motion to withdraw his plea.

¶ 5 On September 25, 2009, defendant appeared in court on a petition to revoke his supervision because he had not paid the ordered restitution and had not completed his community service. Defendant paid the restitution and later appeared on two different dates in October 2009 related to his community service. Defendant's supervision terminated successfully on December 16, 2009.

¶ 6 On November 17, 2010, defendant filed a motion pursuant to section 2-1401 of the Code requesting to withdraw his guilty plea where he received ineffective assistance of counsel when his attorney failed to advise him of the immigration consequences of the plea. Defendant was of Moroccan decent and learned upon reentry into the United State from a trip to Canada that he was subject to deportation because of his theft conviction. On December 8, 2010, a hearing was held during which defendant argued that his guilty plea should be vacated as a result of his counsel's failure to advise him of its immigration consequences in violation of *Padilla v. Kentucky*, 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1473 (2010). The State responded that the petition was

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untimely. The trial court ordered defendant to submit a memorandum in support of his argument.

The memorandum was filed on January 7, 2011.

¶ 7 On February 8, 2011, the trial court held another hearing on the petition. The State argued that the trial court lacked jurisdiction to consider the petition because defendant failed to comply with Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d)) because his request to withdraw the plea was not brought within 30 days of the date on which his sentence was imposed.

Defendant responded that jurisdiction was proper where he did not bring his motion under Rule 604(d) but, rather, under section 2-1401 of the Code and the petition was timely filed within two years of his sentencing. The matter was continued. On the next court date, February 16, 2011, the trial court found that jurisdiction was proper and that the petition was timely filed pursuant to section 2-1401 of the Code. The Assistant Public Defender that represented defendant in his guilty plea then testified that he did not recall representing defendant. The trial court ultimately denied the petition, finding there was effective assistance where defendant could not demonstrate deficient performance.

¶ 8

#### ANALYSIS

¶ 9 Defendant contends the trial court erred in dismissing his section 2-1401 petition for relief from the judgment entered on his guilty plea where that plea was not given freely and voluntarily because his counsel failed to advise him that he would be exposed to potential deportation. The State responds that the trial court did not have jurisdiction to consider the petition pursuant to section 2-1401. In the event we find the trial court did have jurisdiction, the State argues that defendant failed to exercise diligence in presenting the section 2-1401 petition

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and, therefore, it was properly dismissed.

¶ 10 Section 2-1401 of the Code provides relief in the form of a collateral attack from final orders and judgments more than 30 days after their entry. *People v. Mathis*, 357 Ill. App. 3d 45, 49, 827 N.E.2d 932 (2005). Section 2-1401 provides a civil remedy that extends to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17 (2007). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8. A section 2-1401 petition must be filed not later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2010). We review a trial court's dismissal of a section 2-1401 petition de novo. *Vincent*, 226 Ill. 2d. at 18.

¶ 11 The State contends the trial court erred in considering defendant's petition where his ineffective assistance claim was not cognizable under section 2-1401 because it failed to allege any errors of fact. Defendant argues that the State waived review of its contention by failing to raise it before the trial court. It is true that the State did not contest the trial court's jurisdiction to consider the section 2-1401 petition on the basis that it contained a legal allegation; rather, the State argued that the trial court lacked jurisdiction to consider withdrawing defendant's guilty plea because he failed to comply with Rule 604(d). We, however, may consider any argument supported by the record. *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106, 696 N.E.2d 1169 (1998). Moreover, the case cited by defendant in support of his forfeiture argument, *People v. Lucas*, 231 Ill. 2d 169, 175, 897 N.E.2d 778 (2008), is inapplicable because the State did not fail to argue

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that defendant forfeited an issue. We, therefore, consider whether the ineffective assistance claim was cognizable under section 2-1401 and, if so, whether defendant's 2-1401 petition was sufficient.

¶ 12 In *People v. Lawton*, 212 Ill. 2d 285, 818 N.E.2d 326 (2004), the supreme court acknowledged that section 2-1401 petitions are ordinarily used as vehicles to correct errors of fact, but provided that "nothing in the language of section 2-1401 limits its applicability to such matters." *Id.* at 297. Relying on the "guiding principles" of section 2-1401 relief such that "the petition invokes the equitable powers of the circuit court to prevent enforcement of a judgment when doing so would be unfair, unjust, or unconscionable," the supreme court found that petitions filed under the statute may be used to challenge legally defective judgments "when necessary to achieve justice." *Id.* at 297-98. In *Mathis*, this court cited *Lawton* to support its determination that the trial court had jurisdiction to consider a legal challenge raised in a section 2-1401 petition. *Id.* 357 Ill. App. 3d at 50. The *Mathis* court held that the trial court had jurisdiction to consider the legal question where the defendant did not have the means to raise the challenge under the Post-Conviction Hearing Act because he was not imprisoned and was not asserting a substantial denial of his constitutional rights ((725 ILCS 5/122-1(a) (West 2010)). *Id.*; cf. *People v. Pinkonsly*, 207 Ill. 2d 555, 802 N.E.2d 236 (2003) (a section 2-1401 petition was found to be an improper vehicle for asserting a collateral challenge to the defendant's criminal conviction where the defendant had recourse under the Post-Conviction Hearing Act).

¶ 13 Similarly here, once defendant was outside the parameters of the 30 days provided to withdraw his guilty plea pursuant to Rule 604(d), he had no remedy by which to raise an

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ineffective assistance of counsel claim because he was not a person "imprisoned in the penitentiary" as required by the Post-Conviction Hearing Act (725 ILCS 5/122-1(a) (West 2010)). We, therefore, find jurisdiction was proper.

¶ 14 In order to obtain relief under section 2-1401, defendant was required to assert specific factual allegations that: (1) supported the existence of a meritorious defense or claim; (2) demonstrated due diligence in presenting the defense or claim to the trial court; and (3) demonstrated due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381 (1986). Although defendant did file his section 2-1401 petition less than two years after the entry of his guilty plea as required by the statute (735 ILCS 5/2-1401(c) (West 2010)), defendant failed to exercise due diligence where the petition was filed on November 17, 2010, which was 17 months after learning from the Department of Homeland Security that his immigration was at issue due to his conviction. Defendant was detained while attempting to reenter the United States on June 13, 2009. At that time, defendant remained on supervision and appeared in court three times thereafter as a result of his failure to comply with the terms of his negotiated guilty plea. Defendant, however, never complained to the trial court that his attorney failed to advise him of the immigration consequences of his guilty plea. We recognize that *Padilla* was not decided until March 31, 2010. Defendant, however, failed to demonstrate due diligence when he waited nearly eight months thereafter to file his petition. We, therefore, conclude defendant was not entitled to relief under his section 2-1401 petition. Although this was not the trial court's reasoning for dismissing the petition, we may affirm on any grounds supported by the record. *People v. Nash*, 173 Ill. 2d 423, 432, 672 N.E.2d 1166

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(1996).

¶ 15

#### CONCLUSION

¶ 16 We find that, although the trial court had jurisdiction to consider defendant's legal challenge within his section 2-1401 petition, defendant failed to exercise due diligence in presenting the ineffective assistance of counsel claim to the trial court and in filing his section 2-1401 petition. The petition was properly dismissed.

¶ 17 Affirmed.

¶ 18 PRESIDING JUSTICE ROBERT E. GORDON, specially concurring.

¶ 19 I agree with the majority's result but not with their reasoning, and I must clarify some points. When a defendant presents a petition under section 2-1401 of the Code, the defendant has the burden of proof, by a preponderance of the evidence, to show due "diligence in both discovering the defense or claim and presenting the petition" (*Slip op.* at 4), and in supporting the existence of a meritorious defense (*Slip op.* at 6). The majority concludes that once this defendant was detained by an officer of the Department of Homeland Security (DHS), and questioned regarding his immigration status with regard to his criminal record, he had knowledge that he was subject to deportation from the United States as a result of his conviction for theft. However, the defendant's affidavit does not show when the defendant obtained this knowledge. My reading of the affidavit indicates that the defendant obtained that knowledge when he was later served with a Notice to Appear by the DHS. The defendant does not tell us when he was served with that notice. Since the defendant fails to demonstrate when he obtained the requisite knowledge, he fails to sustain his burden of proof as to due diligence in presenting his petition by a preponderance of the evidence. The defendant's affidavit states the following:

"13. On June 13, 2009, upon my return to the United States from a brief visit to Canada, I was detained by an officer of the [DHS].

14. I was questioned by the officer regarding my immigration status and with regard to my criminal record.

15. Subsequently, I was served with a Notice to Appear by the DHS, which charges that I am subject to removal from the United States because of my



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conviction for the offense of Theft, a crime of moral turpitude.”

¶ 20 But most importantly, the defendant fails to show that he had a meritorious defense to the charges. Defendant never claims in his petition or in his affidavit that he had a defense to the charges of theft and that he was innocent. Thus, the defendant’s petition was properly denied on both bases.